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VIA E-MAIL AND FIRST CLASS MAIL

August 2, 2004

J. Antonio Barbosa
Executive Secretary, ALRB
915 Capitol Mall, Third Floor
Sacramento, California 95814

RE: Notice of Opportunity to Provide Written and Oral Argument
Related Case: *Gallo Vineyards, Inc.*, 03-CE-9-SAL and 03-CE-9-1-SAL

GALLO VINEYARDS, INC., (hereinafter "GVI") hereby respectfully submits it Response to the Board's Public Notice and Request for Written Argument in the above-captioned matter.

I.
INTRODUCTORY STATEMENT

In its consideration of the above-captioned matter, the ALRB has invited argument on the following questions:

1. What are the existing standards under the ALRA and the NLRA regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition and setting aside any subsequent election, i.e., is any level of assistance sufficient, or must the assistance be of the a particular scope in order to warrant the remedy of dismissing the petition?
2. Do the factors listed in *Overnite Transportation Company* (2001) 333 NLRB 1392 apply in cases involving unlawful employer assistance in procuring the showing of interest for a decertification petition?
3. Are NLRB cases involving unlawful employer assistance, in the context of withdrawals of recognition or RM petitions, apposite or inapposite to cases

involving only employee-initiated decertification petitions?

In considering the various responses to each of these questions, the Board should always be cognizant of the following principles:

The first principle is: "The chief means by which the Agricultural Labor Relations Act (ALRA or Act) meets its stated goals of ensuring peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations is by the provision of secret ballot elections in which the free choice of those workers for or against representation by a labor organization can be expressed. Whether that choice is between representation and non-representation or between decertification and a continuation of certification, ***the Board views the effectuation of employee free choice as one of its fundamental goals.***" [*Mann Packing Company, Inc.* (1988) 16 ALRB No. 15, at p. 3; emphasis added.] In other words, the Board has an obligation to ensure that the employees' desires concerning representation, when expressed freely, are realized.

In keeping in mind that the Board's obligation is to ensure that the employees' desires concerning representation are realized, the second principle which should guide the Board is this: "Whether the employees desire representation is determined by the election, ***not by the showing of interest***." [*Gaylord Bag Company* (1993) 313 NLRB 306, at 2; emphasis added.] Therefore, if a decertification petition is dismissed and a subsequent election set aside, then the employees' true desires concerning representation as expressed in the election are nullified and remain unrealized. Notions of justice, equity, and fairness would dictate that such a harsh result should only be brought about where the employer was guilty of some substantial degree of misconduct.

As will be discussed more thoroughly below, all three of the Board's questions call for a discussion of when and under what circumstances it is proper to order the extreme remedy of dismissal of an employee-filed and employee-driven decertification petition based on minimal low-level supervisory assistance or support to the decertification effort. The principles espoused above should guide the Board in its determination of this question. The most accurate measure of the employees' free choice is the results of an election.

II.

QUESTION #1: WHAT ARE THE EXISTING STANDARDS UNDER THE ALRA AND THE NLRA REGARDING THE LEVEL OF UNLAWFUL EMPLOYER ASSISTANCE, SHORT OF INSTIGATION, THAT WARRANTS DISMISSING A DECERTIFICATION PETITION AND SETTING ASIDE ANY SUBSEQUENT ELECTION, I.E., IS ANY LEVEL OF ASSISTANCE SUFFICIENT, OR MUST THE ASSISTANCE BE OF A PARTICULAR SCOPE IN ORDER TO WARRANT THE REMEDY OF DISMISSING THE PETITION?

Introduction

GVI has not been able to find one case under either the ALRA or the NLRA where a decertification petition was dismissed simply based on minimal amounts of support or assistance. As will be shown below, in every case where a decertification (or any type of petition) was dismissed, the employer instigated the petition, gave substantial support or assistance to the petition, or engaged in numerous instances of egregious unfair labor practices.[1] This fact by itself seems to answer the Board's question: "Is any level of assistance sufficient, or must the assistance be of a particular scope in order to warrant the remedy of dismissing the petition?"

A. Dismissal of Petitions

1. Standards under the ALRA Concerning Dismissal of Petitions

As will be discussed in this section, Board and court decisions analyzing the ALRA, as well as the ALRB's own stated guidelines, all clearly require that the General Counsel and/or the Charging Party carry its burden of proof to show much more than a minimal level of assistance in order to obtain an order dismissing a decertification petition.

For instance, the *ALRB Elections Manual,* § 2-4330, examples 2 and 3 lists factors that the ALRB should consider when deciding whether a petition should be dismissed. Some of the factors included in the *Election Manual* are: "the ***nature and severity*** of the violations" and "***the number of employees affected*** by the violations." [Emphasis added.] Therefore, dismissal should only be done when conduct by a party has either tainted the showing of interest to such a degree that the requisite showing of interest is no longer sufficient or has created a situation where the employee's free choice can no longer be expressed. Moreover, the language of the *Manual* itself indicates that much more than minimal involvement in a decertification effort is required in order to justify dismissing a petition, as it requires the Board to consider the ***nature and severity*** of the violation. This is contra to any assertion that "any level of assistance" is sufficient. Additionally, the Board has clearly contemplated in the past that ***any*** level of assistance

1 "...[I]nstigation and unlawful assistance are separate concepts." [*Abatti Farms* (1981) 7 ALRB No. 36.]

is not sufficient; otherwise, it seems unlikely that it would have stated these requirements in the *Manual.*

In all situations where the ALRB has dismissed a petition, the Employer's conduct involved either instigation or a substantial and pervasive level of assistance to the petitioner.

In *S & J Ranch, Inc.* (1992) 18 ALRB No. 2, the ALJ recommended, and the Board upheld, dismissal of a decertification petition and recommended that the resulting election be set aside without a tally of ballots. In that case, the ALJ found that the Employer ***instigated*** the decertification petition. [*Id.* at 1.] The first work day after a work stoppage, company official Charlie Rose spoke with the two workers who would become the decertification petitioners over their lunch break, which went longer than it was supposed to. [*Id.* at ALJD 4 and 88.] The two workers filed their decertification petition shortly after that meeting. In addition, the ALJ found that a supervisor (Murillo) actually instigated the petition and that the two petitioners "were mere figureheads." [*Id.* at ALJD 89.] The ALJ also found that the employer's agents, which included a crew leader, a personnel employee, and two labor consultants, personally, actively, and openly circulated the petition among many crews over the course of days and during working hours. While the petition was being circulated, these agents actively spoke against the union. [*Id.* at ALJD 89.]

In *Peter D. Solomon, et al. dba Cattle Valley Farms* (1983) 9 ALRB No. 65, a decertification petition was dismissed because the employer actually ***instigated*** the petition by bringing a group of employees together and gave the employees an attorney's name for advice on how to decertify the union. Although some employees were disgruntled with the union, no employee had actually considered decertification until the idea was placed in their minds by the employer and its counsel. This was an act of ***instigation*** and not of ***assistance.*** [*Id.* at 4-5.]

In *Nick Canata* (1983) 9 ALRB No. 8, the Board dismissed a decertification petition because it was invalid as the petition was filed by an agent of the employer. The Board also found that the petition was tainted by ***substantial*** employer assistance. The agent of the employer gathered *all* of the twenty-six (26) members of the unit together for a meeting in which she discussed decertifying the union. The agent began the meeting by informing the workers that they would all receive a paid holiday for Labor Day, for which they had never before been paid and which was not provided for in the CBA. She then went on to discuss decertification, and may have even threatened one employee with termination if he did not give his support to a decertification effort. Additionally, Nick Canata, the employer, made unlawful promises of improved medical benefits during the decertification campaign.

In *Abatti Farms* (1981) 7 ALRB No. 36, the Board dismissed a decertification petition based on unlawful assistance of such a magnitude that the entire petition was tainted. The employer was found to have rendered unlawful assistance directly to the petitioner

himself, and that assistance consisted of the following conduct: (1) the employer allowed the petitioner an extended absence from work to circulate the petition; (2) the employer gave the petitioner a Christmas bonus "well in excess of any bonus received by the other tractor drivers"; (3) the employer allowed the petitioner to charge the employer for broken glass on his car; (4) the petitioner remained eligible for insurance despite the fact that the petitioner did not work enough hours during the month he was circulating the petition to entitle him to coverage; and (5) the employer made arrangements for the petitioner to be represented by legal counsel. Additionally, the Board found that the company gave a Christmas party where the decertification petition was circulated in the presence of company supervisors. The Board also found that the employer, through the acts of a crew foreman, Jose Rios, unlawfully assisted the decertification effort by allowing the wife of one of the petitioners, who was a worker on Rios' crew, to come on duty one-half (1/2) hour late after circulating the petition without being docked pay for the time she was late. Jose Rios also threw a party at a local restaurant where workers gathered and the decertification petition was circulated in front of many supervisors.

Even a cursory review of the above cases show that the ALRB has only dismissed decertification petitions where there was either instigation or a substantial level of support. Moreover, the ALRB's *Elections Manual* instructs the Board to only dismiss a decertification petition after evaluating the nature and severity of the employer's violations and how many employees the violations were likely to taint. GVI asserts dismissal of a decertification petition is required only where the nature and extent of the employer's violations tainted the showing of interest to such an extent that the statutory minimums are not present. If the showing is then insufficient, then the petition should be dismissed. However, if the showing remains sufficient, then a decertification election should be held. This method is the only method by which the desires of the employees concerning representation can truly be ascertained and the purposes of the ALRA truly effectuated.

The Board should also be cognizant of the following principle, which is set forth in Section 1140.2 of the ALRA (California Labor Code § 1140.2), which provides in pertinent part: "It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to ***full freedom of*** association, self-organization, and ***designation of representatives of their own choosing.*** ..." [Emphasis added.] Therefore, public policy mandates that the Board not apply a mechanical, per se rule automatically dismissing a decertification petition every time they find any level of assistance or support. To do so would be to deprive agricultural employees of their statutorily guaranteed right to "full freedom of ... designation of representatives of their own choosing. ...," which necessarily includes the choice of no representative and to decertify the incumbent representative.

As is discussed in the following section, the standards under the NLRA are the similar.

2. Standards under the NLRA Concerning Dismissal of Petitions

Like the standards under the ALRA, NLRB cases and its *Operations Manual* mandate that more than mere assistance is required to justify dismissing a decertification petition.

Like the ALRB's *Elections Manual,* the NLRB's *Operations Manual* also sets forth guidelines for determining when dismissal of a petition is appropriate: "If the conduct that forms the basis of an 8(a)(1) charge is assistance as opposed to instigation, the Regional Director should determine ***if there is still a showing of interest without the tainted showing and, if so, the petition should not be dismissed.***"

Further, the *Operations Manual* states that there are situations where a free choice is possible notwithstanding a ULP complaint. Section 11731.2 states: "There may be situations where in the absence of a request to proceed (Sections 11731.1(a) and (c)), a regional director is of the opinion that the employees could under the circumstances exercise their free choice in an election, and that the R case should proceed notwithstanding the existence of a concurrent type 1 or type 2 unfair labor practice case and the absence of a request to proceed or waiver." The section lists several factors that should be considered. Two of the most relevant factors are: "The size of the work force relative to the number of employees involved in the events or affected by the conduct alleged in the charge, and the entitlement and interest of the employees in an expeditious expression of their presence regarding representation, the showing of interest, if any, presented in the R case by the charging party and the timing of the charge.

Section 11730.3(a) of the *Operations Manual* states:

> These are Section 8(a)(1) and (2) or 8(b)(1)(A) charges that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition. If meritorious, such a charge may invalidate the petition or some or all of the showing of interest. As a consequence, the petition may be dismissed. Sec. 11733.2(a)(1).

Examples:

- A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the initiation of a RD or UD petition.

- A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the support of a RD or UD petition, ***if the showing is reduced below the 30 percent after the tainting showing is subtracted.***

- A finding of merit to an 8(a)(2) charge that alleges employer representatives assisted in the showing of interest obtained by a labor organization, if the showing is reduced below 30 percent after the tainted showing is subtracted.

- A finding of merit to an 8(b)(1)(A) charge that alleges a labor organization's showing of interest was obtained through threats of force, if the showing is reduced below 30 percent after the coerced showing is subtracted. [Emphasis added.]

Finally, the *Operations Manual*, § 11733.2(a)(1) states:

> If the Regional Director finds merit to an 8(a)(1) and (2) or 8(b)(1)(A) charge that challenges the circumstances surrounding a petition or the showing of interest submitted in support of a petition (Sec. 11730.9(a)) and the alleged conduct, if proven, directly affects a petition ***or its showing of interest to an extent that the showing is insufficient,*** then the petition should be dismissed, subject to reinstatement by the petitioner after final disposition of the C case. Sec. 11733.2(b). [Emphasis added.]

The cases under the NLRA also demonstrate that the General Counsel and/or the Charging Party bear the burden of proof to show more than minor or minimal assistance in order to justify dismissing a petition. In *Gaylord Bag Company* (1993) 313 NLRB 306, the employer sought to have a representation petition dismissed because union representatives approached a handful of employees and promised them a union fee waiver if they voted for the union. The Board held that such conduct would not be sufficient to dismiss the petition, and reasoned: "Nonetheless, even considering the adequacy of the Petitioner's showing of interest in light of the Employer's evidence, we are satisfied that it was adequate to support the petition. The Petitioner submitted 40 authorization cards to support its petition for an election in a unit containing approximately 62 employees, well in excess of the 19 cards needed for a 30-percent showing. ... Even without reliance on the cards of the five Employer witnesses who may have succumbed to the alleged fee-waiver promises, the showing was still greater than that we require. ... Even if seven authorization cards were rejected as tainted, there would still have been an adequate showing of interest." [*Id.* at 2.]

Another case which demonstrates that a substantial level of assistance is required in order to find that an employer interfered with employees' section 7 rights under the NLRA is *Placke Toyota, Inc.* (1974) 215 NLRB 395. In *Placke Toyota, Inc.*, the decertification petitioner (Whalen) asked a supervisor (Williams) how to go about getting rid of the union. Williams told Whalen to contact the NLRB. Whalen later asked Williams if Williams would have someone type of a decertification petition from Whalen's handwritten copy. Williams had one of the clerical staff type of the petition on the company's letterhead. The petition was placed on Williams' order desk, which was the

desk Williams used to distribute work orders to the employees. The petition remained on the supervisor's order desk for several days, and other employees came by and signed it. Two employees signed it in supervisor Williams' presence. Williams later asked one of those two employees to file the document with the Board. The employee refused and Williams told him that he would ask Whalen to file the petition with the Board. The Board found that the company had committed an unfair labor practice based on the fact that the petition was typed up on Company letterhead, the supervisor circulated the document as a company document by putting it on the order desk, where it remained for several days, and the supervisor asked an employee to file it with the Board.

Other cases demonstrate that a substantial level of assistance, coupled with threats and other unfair labor practices committed by the employer warrant dismissing a petition. In *Indiana Cal-Pro, Inc. v. NLRB* (6th Cir. 1988) 863 F.2d 1292, the employer engaged in multiple serious and pervasive misconduct with respect to an anti-union petition withdrawing support for the union. The petition was given no effect and a bargaining order was imposed because two management officials who were responsible for the day-to-day operation of the location at issue repeatedly made what were found to be widely disseminated threats to several employees that the employer would close the plant if the plant became unionized. The two officials also interrogated several employees about their union sentiments. Additionally, the plant supervisor actually drafted and signed one petition which disavowed support for the union and was present when other employees signed. That petition was invalid, so a management official who was second-in-command at the plant asked several employees to draft another petition, which was also found to be invalid.

And still another case demonstrates that employer ***instigation,*** as opposed to mere assistance, will justify dismissing a petition. In *Hall Industries, Inc.* (1989) 293 NLRB 785, 791, the decertification petition was ruled void ab initio because the employer planted the idea of decertification in the minds of the employees by suggesting promises of benefits if the union was gone and threats of job loss or plant closure if the union remained. This induced employees to approach the employer to inquire about decertification. [*Id.* at 790.] In *Hall,* the employer ***instigated*** the petition.

The cases and materials under the NLRA show that mere assistance without more does not justify the extreme and harsh remedy of dismissal of a decertification petition. As discussed above, the NLRB actually instructs itself in its *Operations Manual* that where there is a question regarding taint to a decertification petition, the allegedly tainted signatures should be subtracted from the petition to determine whether or not the showing of interest remains sufficient. If the showing remains sufficient, the election should proceed. The NLRB's view is consistent with the principle espoused in *Gaylord Bag Company* (1993) 313 NLRB 306, at 2: "Whether the employees desire representation is determined by the election, not by the showing of interest."

B. Set Aside of Elections

The ALRB has posed the following question: "What are the existing standards under the ALRA and the NLRA regarding the level of assistance, short of instigation, that warrants dismissing a decertification petition ***and setting aside any subsequent election...?"*** [Emphasis added.] The question, as phrased, acknowledges that where a decertification election has been held and the ballots impounded pending the determination of an unfair labor practice charge, the result of a dismissal of the petition is indeed a ***set aside of the election***, even though there is no tally of the ballots. This is necessarily true because in such a case the election has taken place and workers have cast their ballots, thus dismissal of the decertification would result in the ballots never being counted and the results of the election set aside, although the results remain unknown.

As discussed above, when the question at bar is only whether *dismissal of a petition* is an appropriate remedy, it is clear that much more than a minimal level of assistance or support is required.

However, as will be discussed in the following section, once an election has been held, dismissal of petition requires a set aside of the election results, which requires that the objective party meet its heavy burden of proof to show that the employer's conduct affected the outcome of the election.

1. Standards under the ALRA Concerning Set Aside of Elections

In addition to the ALRB *Elections Manual* specifically calling for a consideration of the ***nature and severity*** of the conduct, there does not seem to be any authority whatsoever for the extreme remedy of dismissal where there is nothing more than minimal or "mere" assistance or support.

To discount the employee expression in an election clearly requires conduct which would tend to have hindered or negatively affected that expression. "It is well established that the party objecting to an election bears a heavy burden of demonstrating not only that improprieties occurred, but that they were sufficiently material to have impacted on the outcome of the election." [*Oceanview Produce Company* (1994) 20 ALRB No. 16, at 6, citing *Nightingale Oil Co. v. NLRB* (1st Cir. 1990) 905 F.2d 528]. Moreover:

> The burden is not met merely by proving that misconduct did in fact occur, but rather by specific evidence demonstrating that it interfered with the employees' exercise of their free choice to such an extent that the conduct changed the results of the election .... [¶] We are also

> mindful that we are required to certify the results of a free and fair election pursuant to the provisions of Labor Code section 1156.3(c) unless we are persuaded that sufficient reasons exist for us not to do so. [Citation.] ... In effect section 1156.3(c) creates a presumption in favor of certification, whether a representation or decertification election [citations], which a party objecting to an election bears a heavy burden to overcome [citation]. Since we have long enjoyed a realistic "outcome determinative" test and have rejected a highly technical "laboratory conditions" standard for determining whether an expression of employee free choice will be set aside [citation], a party, whether labor organization or employer, objecting to an election can meet its burden by a showing of specific evidence that misconduct occurred and that this misconduct tended to interfere with employee free choice to such an extent that it affected the results of the election. [Citation.] We many also consider, as an additional factor, the nature and extent of the alleged misconduct in light of the margin of victory. [Citation.] [*Mann Packing Company, Inc.* (1988) 16 ALRB No. 15; *Oceanview Produce Company* (1994) 20 ALRB No. 16, at 6, citing *Kux Manufacturing Co. v. NLRB* (6th Cir. 1989) 890 F.2d 804.]

As acknowledged in *Mann Packing Company, Inc.,* and *Oceanview Produce Company,* the Board is permitted to consider "the nature and extent of the alleged misconduct in light ***of the margin of victory."*** In order to make such an analysis, a tally of ballots is required. As such, logic would dictate that any determination of whether employer conduct was sufficiently coercive to affect the results of the election would be predicated upon the ballots being counted, so that the impact of a party's conduct can be judged against the results of the election.

In any case where there has actually been an election, and the result of the Board's remedy would be to nullify the results of that election, the standard should be the ALRB's outcome-determinative test. And since the party objecting to an election has a heavy burden to overcome in order to warrant setting aside the results of that election, the burden is squarely on the General Counsel and/or the Charging Party to prove that the employer's misconduct actually affected the results of the election. To hold that there should be otherwise in any case where an election has actually been held would convey the following message to workers: "We know you have cast your vote, but because of a highly technical and minor infraction of the rules, we are going to ignore your vote."

As will be discussed below, in order to set aside an election, the ALRB has consistently held that the employer's misconduct must have been sufficiently coercive to have actually affected the outcome of the election.

In *Frudden Enterprises, Inc.* (1981) 7 ALRB No. 22, a union organizer led union supporters onto fields where crews were working prior to a certification election. The union supporters shouted union slogans and obscenities at workers who were working on machines and requested they leave the fields. Some supporters climbed onto the machines at one location. At another location they threw tomatoes (and possibly dirt clods) at the workers who would not leave their machines. The employer objected to the election based on this conduct, arguing that workers refrained from voting at all because they were fearful of retaliation from the union. The ALJ found (and the Board affirmed) that this conduct was not sufficiently coercive to warrant setting aside the election. Two workers testified that they were so frightened from the incident that they did not vote in the election. The ALJ noted: "Based on the evidence herein, the employer would extend its argument that employees were too frightened to vote to all employees on the eligibility list who did not vote in the election." [*Id.* at ALJD 55.] The ALJ then found: "Although I credit the testimony of [the two workers] that they personally did not vote out of fear, there is no basis for generalizing from their testimony to conclusions about the motives of others" and "[n]or is the conduct herein sufficiently serious to warrant an inference that any of the 200 votes cast for the UFW were cast out of fear or confusion caused by the union's tactics." [*Id.* at ALJD 58.]

In another case, a supervisor's participation in the union's campaign was not sufficiently coercive to warrant setting aside the results of the election. In *Bright's Nursery* (1984) 10 ALRB No. 18, at pps. 40-42, the Board held: "Assuming, arguendo, that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar were supervisors within the meaning of the Act, their conduct was not sufficiently coercive to warrant setting aside the election. The NLRB has consistently held that 'mere supervisory participation in a union's organizing campaign does not, without a showing of possible objectionable effects, warrant setting aside an election.' [Citations.]" In considering this case it is important to remember that the ALRB uses an outcome-determinative test while the NLRB uses a "laboratory conditions" test. In *Bright's,* the Board acknowledged that even the NLRB under its more strict standard holds that "mere supervisory participation" does not warrant setting aside an election. In addition, it would seem inconsistent with notions of justice and equity to employ one standard for minor supervisory participation in a *union's* campaign but then employ another standard altogether for minor supervisory participation in the employees' decertification effort.

In *Bud Antle* (1977) 3 ALRB No. 7, at 15, the Board found that supervisory conduct did not affect the results of the election: "We note further that even if the presence of the two supervisors influenced the free choice of the voters, their presence and anything they may have said to both crews of 40-60 voters had no discernible impact upon the results of this election where the Teamsters won by a margin of more than 600 votes."

As shown by ALRB cases, in order to warrant setting aside the results of an election, there should be a tally of the votes and a determination as to whether the employer's conduct affected the results of the election. Moreover, the burden to prove that the

employer's conduct affected that tally rests squarely on the party asserting it (the General Counsel and/or the Charging Party).

2. Standards under the NLRA Concerning Setting Aside an Election

Even though the NLRB employs a "laboratory conditions" test, the cases under the NLRA also demonstrate that in order to warrant setting aside an election, the misconduct of the employer must have been sufficiently coercive, pervasive, or egregious that it could be reasonably believed to have affected the results of the election.

In *Metz Metallurgical Corp.* (1984) 270 NLRB 889, seventeen days prior to a certification election, a low-level supervisor initiated a conversation with a worker in which the supervisor asked the worker how he felt about the union. The supervisor then commented that employees would lose certain fringe benefits if the union won the election. The hearing officer recommended setting aside the results of the election. The NLRB disagreed: "Assuming arguendo that Supervisor Van Lit's conduct did entail proscribed interrogation and threats of lost benefits, we find that this single incident was ***de minimis*** with respect to affecting the results of the election. ***In determining whether certain conduct is de minimis, the Board takes into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors.*** Caron International, Inc., 246 NLRB 1120 (1979). Any misconduct here occurred 17 days before the election during a single isolated conversation between a low-level supervisor and one employee. There was no other objectionable conduct. Only one other employee in a large unit of 136 eligible voters is shown to have learned about the conduct. Under these circumstances, it is virtually impossible to conclude that Van Lit's conduct could have affected the results of the election. We will not set aside the election based on such a remote possibility." [*Id.* at 889; emphasis added.]

In another case, the Board found that more than minor conduct is required in order to warrant setting aside the results of an election. In *Clark Equipment Company* (1986) 278 NLRB 498 (partially overruled on other grounds): The NLRB found unlawful conduct by the employer involving eight different employees. Such post-petition conduct included unlawful interrogation accompanied by coercive comments and threats, and unlawful surveillance. The ALJ recommended setting aside the election. The NLRB disagreed: ". . . [W]e conclude that [the misconduct] that did occur do[es] not warrant setting aside the election. In researching this determination, we are cognizant that it is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since "[c]onduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." However, the Board has departed from this policy in cases ***where it is virtually impossible to conclude that the misconduct could have affected the***

election results. In determining whether misconduct could have affected the results of the election, we have considered 'the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors.' . . . [¶] Here, the Respondent engaged in the above-described incidents of preelection misconduct involving eight different employees. However, these incidents occurred in a unit of over 800 employees and in the midst of an active and open campaign....Further, all incidents involved only one or two employees, and no evidence of dissemination was presented. Taking these factors into consideration, we cannot conclude that this misconduct could have affected the results of the election, which with a tally of 391 for, and 489 against, the Union, cannot be characterized as close. We, accordingly, overrule *all* the objections and certify the results of the election. " [*Id.* at 503; emphasis added.]

In yet another case, the Board has disregarded supervisorial misconduct during a campaign because it was of a minimal nature. In *Allied Foods, Inc.* (1971) 189 NLRB 513, the Board found that ***the participation and assistance of two supervisors***, who signed union authorization cards, spoke with employees about joining the union, and wore union buttons, was "***of a minimal nature which would not have affected the results of the election***." [Emphasis added.] Again, it would seem unjust to impose a different standard for the union than for an employer.

In *Keith Austin, Inc. D/B/A The Video Tape Company* (1988) 288 NLRB 646, the Board stated: "[T]he Board's general policy is to set aside an election whenever an unfair labor practice occurs during the 'critical period.' There is a limited exception to this policy, however, in situations where the '***misconduct is de minimis with respect to affecting the results of an election***.' Caron International, 246 NLRB 1120 (1979)." [*Id.* at 646; emphasis added.]

In *Caron International* (1979) 246 NLRB 1120, the Board stated the rule for determining whether conduct is de minimis and insufficient to warrant setting aside an election: "In resolving the question of whether certain Employer misconduct is de minimis with respect to affecting the results of an election, the Board takes into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors. See, e.g., Super Thrift Markets, Inc. d/b/a Enola Super Thrift, 233 NLRB 409 (1977)."

In *Ron Tirapelli Ford, Inc. v. NLRB* (7th Cir. 1993) 987 F.3d 433, the employer did engage in misconduct. However, in that case, the employer instigated the petition. Mr. Tirapelli talked with union members Ramiro Caudillo, Edward Mance, and Jeff Momper in an effort to obtain their signatures on a decertification petition. At these interviews, Mr. Tirapelli promised them better benefits and a company profit-sharing plan when the union was ousted. He also made veiled threats and promises in coercive circumstances. [*Id.* at 435.] In invalidating the election, the Court reasoned: "In other circumstances, where there is a violation of the Labor Act by an employer during the

pre-election period, the Board has determined, as a general rule, that ***only post-petition conduct is relevant to the determination as to whether the employer's conduct affected the election results***. *See Ideal Elec.,* 134 N.L.R.B. 1275 (1978). Here, however, the employer not only affected the results, ***it staged the entire electoral process***. Under these circumstances, the Board certainly was justified in concluding that the purposes of the Labor Act could only be preserved by nullification of the entire scheme." [*Id.* at 443; emphasis added.] It is also interesting to note that in that case, the Court noted that where a decertification petition is not instigated by the employer, ***only post-petition conduct is relevant in determining whether the employer's misconduct affected the results of the election.***

An important point was mentioned in the *Ron Tirapelli Ford, Inc.,* case. As highlighted in the preceding paragraph, the Court noted that the NLRB only considers ***post-petition*** conduct in determining whether an election should be set aside. Other cases have discussed this proposition, too. In *The Ideal Electric and Manufacturing Company* (1961) 134 NLRB 1275, 1277-1278, the NLRB held that "any substantial interference which occurred during the crucial period before an election might constitute a basis for setting aside the election....***[T]he date of filing of the petition...should be the cutoff time in considering alleged objectionable conduct in contested cases.***" [Emphasis added.]

If there has been an election, the results of that election can only be set aside where the employer has engaged in misconduct which affected the results of the election. The Board is not permitted to consider conduct which occurred prior to the filing of the decertification petition in determining whether the employer's misconduct affected the results of the election. Therefore, if the Board opts to conduct an election, despite a pending unfair labor practice charge concerning the decertification petition, the misconduct which is the subject of that unfair labor practice charge should not be considered in deciding whether or not to set aside the election. The Board may still impose other remedies, but not a dismissal of the decertification petition which would result in the set aside of the election, absent instigation or the existence of contemporaneous unfair labor practices. The ALRB should take this position, too.

And finally, in *Hecla Mining Company v. National Labor Relations Board* (1977) 564 F.2d 309, the United States Court of Appeals for the Ninth Circuit discussed what should be the standards in determining whether an election should be set aside. The Court declined to enforce an NLRB order setting aside an election. The ALJ had recommended that the election be set aside after hearing elections objections, based on the coercive conduct of two low-level lead men. The Court held that in order for a representation election to be set aside, there must be proscribed conduct which prevented employees from freely registering their choice of a bargaining representative. The Court also held that to determine the impact of proscribed conduct, factors to be considered include the rank of the individual who engaged in the conduct, whether the employer or the employee engaged initiated the communication, the total background of

all preelection conduct and any evidence directly suggesting that the conduct had either an isolated or a pervasive impact.

The Court also held that low-level statutory supervisors, classified as "lead men" who were permitted by the union to vote in a representation election, were not "responsible members of management" whose views "had a corresponding weight" and thus they were in fact marginal supervisors whose influence was required to be discounted accordingly on the question of improper preelection conduct. The Court also noted that certain statements of the low-level supervisors/lead men, were isolated and had no impact on employees and no effect on the outcome of the election. The Court held that isolated, non-threatening statements of opinion cannot be transformed or transmuted by magic of semantic labels into threats which had significant effects upon the election. Finally, the court made specific note of the fact that the employees who were the recipients of the supervisors' remarks were not influenced by them. The record was "devoid of any hint that anyone else overheard or was told of the conversations" and the hearing officer's conclusion that "the statements to [the employees], though seemingly isolated, had a significant effect on other voting unit employees as well" is "simply unsupported by the record. It is a conclusory judgment which tracks the case law requirement for overturning the election."

C. Conclusion

The cases involving employer ***instigation*** of a decertification petition must necessarily be treated differently than cases involving allegations of minor or minimal employer ***assistance or support.*** In cases where the employer has been found to have instigated the petition, the petition would not have existed but for the employer's misconduct. In assistance cases, the employer is alleged to have rendered support or assistance to an already existing decertification effort, one that was ***employee-initiated and employee-driven***. In such a case, the extent of taint should be analyzed according to the facts and the degree of the conduct. Subtracting the amount of signatures from the showing of interest in order to determine whether the showing of interest is still sufficient after the alleged "tainted" signatures have been disregarded is essential to a determination as to whether the decertification petition should be dismissed, as is the stated policy of the NLRB.

In any event, the result should not be based on a mechanical per se rule that any level of employer assistance to a decertification petition should result in its dismissal or a set aside of the subsequent election. Such a rule would not be compatible with employee rights and would lead to a manipulation of the process.

By way of contrast, in cases where there is employer ***instigation*** , a dismissal may be appropriate because again, the petition leading to a decertification election would not have existed but for the employer's unlawful conduct.

In cases where only minor conduct is alleged, the Regional Director should simply remove the extent of any alleged "taint" from the showing of interest and determine whether the petition remains sufficient to direct that an election be held. If the Regional Director determines that the petition is insufficient after any alleged taint has been removed, then he should either dismiss the petition or direct an election with the ballots being held in abeyance pending the outcome of a hearing on the unfair labor practices. If the results of the hearing are that the employer committed the misconduct of which he was accused and the showing of interest was insufficient after the taint was removed, or that the employer's misconduct was so pervasive and egregious that the entire petition was tainted, then and only then should the petition be dismissed and the results of the election set aside.

In every case concerning a decertification petition, the burden of proof is on the General Counsel or the Charging Party to show that the decertification petition is tainted and the extent of such taint and to prove that the decertification should be dismissed. In every case where an election has been held, the burden of proof is on the General Counsel and/or the Charging Party to prove with specific evidence that the misconduct of the employer was so egregious or pervasive that the results of the election were affected and should be set aside.

III.

QUESTION #2: DO THE FACTORS LISTED IN *OVERNITE TRANSPORTATION COMPANY* (2001) 333 NLRB 1392 APPLY IN CASES INVOLVING UNLAWFUL EMPLOYER ASSISTANCE IN PROCURING THE SHOWING OF INTEREST FOR A DECERTIFICATION PETITION?

Any discussion of *Overnite Transportation Company* (2001) 333 NLRB 1392 must first begin by noting that the ***factors*** that the NLRB analyzed are what are at issue and not the very specific and egregious ***facts*** of that case.

In *Overnite,* the Board held:

> The Board generally will *dismiss* a representation petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint alleging conduct that, if proven, (1) ***would interfere with employee free choice in an election***, and (2) is inherently inconsistent with the petition itself. The Board considers conduct that taints the showing of interest, precludes a question concerning representation, or taints an incumbent union's subsequent loss of majority support to be inconsistent with the petition. [*Id.* at 2; emphasis added.]

> Not every unfair labor practice will taint a union's subsequent loss of majority support or taint a decertification petition. ***There must be a causal connection***....Where a case involves unfair labor practices other than a general refusal to recognize and bargain, ***a causal connection must be shown between the unfair labor practices and the subsequent employee disaffection with the union in order to find that a decertification petition is tainted, thereby requiring that it be dismissed***. [*Id.* at 2; emphasis added.]
>
> To determine whether a causal relationship exists between unfair labor practices and the subsequent expression of employee disaffection with an incumbent union, the Board in Master Slack Corp., supra, identified several relevant factors. These factors include: (1) ***the length of time between the unfair labor practices and the*** withdrawal of recognition or the ***filing of the petition***; (2) the ***nature*** of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) ***any possible tendency to cause employee disaffection from the union***; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. [*Id.* at 2; emphasis added.]

The *Master Slack* factors set forth in *Overnite* support the argument that there must be some level of conduct greater than mere assistance or support in order to justify setting aside an election, as those factors require an analysis of "the nature of the illegal acts," "any possible tendency to cause employee disaffection from the union," and requires a "causal connection."

Overnite recognizes that an employer's misconduct must have ***caused*** the filing of the decertification petition or the employees' disaffection with the union. In other words, the misconduct must have existed ***prior*** to the disaffection to have "caused" it. This necessarily cannot occur in a case where the employer's conduct occurred ***during*** the circulation of an already extant petition which was ***employee-initiated and employee-driven*** unless the employer's conduct became the driving force***.*** Additionally, as the *Overnite/Master Slack* factors require a causation analysis, the burden of proof is squarely on the General Counsel and/or the Charging Party to prove that the employer's misconduct ***actually caused*** the employee's disaffection with the union, which resulted in the petition for decertification. This can only be done by presenting specific evidence of causation. This burden cannot be met by merely proving that some misconduct occurred, without proving the causation link.

This rationale also lends itself to an analysis of the extent that the showing of interest is tainted, which can only be determined by subtracting tainted signatures. If the decertification petition was sufficient without the "taint", then the alleged unfair labor

practice did not ***cause*** the filing of the petition or the employees' disaffection with the union.

In analyzing whether the *Overnite/Master Slack* factors are relevant, the Board should be cognizant of the type of misconduct that the Board found to violate those factors in *Overnite*. In applying *Master Slack* and finding a causal connection, the Board described the employer's various acts of misconduct as: "serious and pervasive," "nationwide," "highly coercive," "hallmark violations—such as the granting of an unprecedented wage increase, as well as threats that employees would lose their jobs and that the Employer would close if the employees selected the Union—which are highly coercive and have a lasting effect on the employees," "numerous serious and pervasive unfair labor practices," "particularly coercive," "discriminatory actions," "highly coercive and unlikely to be forgotten." [*Id.* at 4-5.] These are all numerous, pervasive, and egregious acts of misconduct that are likely to cause employee disaffection with their union. Again, it is the level of the misconduct that establishes a causal connection.

GVI also contends that alleged conduct which has been the subject of a settlement agreement which contains a non-admission clause should not ever be used as evidence of a coercive environment. Such conduct has not been admitted, litigated, nor proven, and should not therefore be used against an employer in determining whether the employer's work environment was so hostile to the union as to promote disaffection from the union. In *BPH & Company, Inc. v. NLRB* (D.C. Cir. 2003) 333 F.3d 213, the United States Court of Appeals for the District of Columbia Circuit held that the Board's determination that the employer's alleged unfair labor practices caused a loss of support for the union because it relied on a prior settlement agreement which contained a non-admission clause "contravenes the Act because it allows the Board to routinely find a violation of the Act in the absence of substantial evidence. The only evidence on which the Board based its finding that the Company's ULPs caused the loss of support for the Union is [a settlement agreement]—an Agreement that specifically provides that the Company admitted no wrongdoing. This falls far short of satisfying the substantial evidence standard." [*Id.* at 222.] Note that in *BPH & Company, Inc.,* the Court also stressed the requirement that the Board must base its decision on ***substantial evidence***, and not on facts not proven by General Counsel.

In all cases where an election has been held, the standards for setting aside an election discussed above in response to the Board's first question should be applied (i.e., whether the conduct had any effect on the outcome of the election).

IV.

QUESTION #3: ARE NLRB CASES INVOLVING UNLAWFUL EMPLOYER ASSISTANCE, IN THE CONTEXT OF WITHDRAWALS OF RECOGNITION OR RM PETITIONS, APPOSITE OR INAPPOSITE TO CASES INVOLVING ONLY EMPLOYEE INITIATED DECERTIFICATION PETITIONS?

In withdrawal of recognition or RM petition cases, the NLRB determines whether a decertification petition is tainted such that it warrants treating it as though it never existed, or as though it was dismissed. Therefore, such cases are relevant to a determination as to whether unlawful employer assistance justifies dismissal of an employee-initiated decertification petition.

As will be shown below, the NLRB cases discussing withdrawal of recognition or RM petitions appear to be relevant because they too use the *Master Slack* factors (discussed in Question No. 2, above) and demonstrate the need to show that the decertification petition fell below the required showing of interest once any "tainted" signatures were discounted. In addition, like *Overnite Transportation* and *Master Slack* (discussed in response to Question No. 2, above) the withdrawal of recognition cases and the RM cases also discuss whether the employer's misconduct actually ***caused*** the decertification petition to be filed. In the NLRB cases cited below, the misconduct existed ***prior*** to the decertification petition, not after one already existed and was being actively circulated by employees.

In withdrawal of recognition cases, it is clear that the NLRB requires the Party requesting a dismissal to present substantial and specific evidence that is more than mere support or assistance to nullify a decertification petition or hold that an employer cannot rely on such a petition in withdrawing recognition.

In *Quazite Division of Morrison Molded Fiberglass Co. v. NLRB* (D.C. Cir.1996) 87 F.3d 493, the NLRB held that Quazite committed various unfair labor practices which had not been remedied when Quazite withdrew recognition from the union, and ordered Quazite to bargain with the union for one year. The Board found the following unremedied unfair labor practices: dealing directly with employees on grievance matters; failing to notify the union before discontinuing incentive pay for assemblers who performed grinding tasks; and refusing to furnish the union with attendance records. Quazite also offered benefits to several employees if they agreed to resign from the union. The Board also found that the Company harassed striking employees only a few weeks before they signed the anti-union cards. Finally, the Board also suggested that the Company's ULPs, individually and cumulatively, may have contributed to the failure of contract negotiations, which may in turn have dampened employee enthusiasm for the union.

Quazite appealed on the grounds, inter alia, that the Board failed to give a reasoned explanation for its finding and remedy. With respect to the allegation that Quazite unlawfully withdrew recognition from the Union, the Court of Appeals for the District of

Columbia Circuit remanded the case back to the Board to substantiate the Board's claim that Quazite's unfair labor practices had a ***meaningful impact*** upon employee support for the union.

The appellate court held:

> We have consistently held that the Board must adduce ***substantial evidence*** to support its finding that an employer's unfair labor practices tended to undermine a union's majority support. [Citations.] Applying that principle in *Williams Enters. Inc. v. NLRB,* 956 F.2d 1226 (1992), we advised the Board that in assessing the effect of an unfair labor practice upon a petition stating that employees did not want to be represented by a union, it 'could have considered any improper conduct . . . providing that it adequately explained the basis for a finding that the conduct tainted the petition.' [Citation.] The Board itself, in *Master Slack Corp.,* 271 N.L.R.B. 78, 84, 1984 WL 36573 (1984), had earlier identified four factors that it would consider in determining whether an unfair labor practice had a 'meaningful impact' upon employees' adherence to the union. In *Williams* we endorsed the Board's formulation of the relevant factors, namely: '(1) The length of time between the unfair labor practices and the employee petition; (2) the nature of the unfair labor practices, including whether they are of a nature that would cause a lasting or detrimental effect on the employees; (3) the tendency of the unfair labor practices to cause employee disaffection with the union; and (4) the effect of the unlawful conduct on the employees' morale, organizational activities, and membership in the union. [Citation.]' [Emphasis added.]

The Court went on to reason: "Lacking both ***substantial evidence*** and a reasoned explanation of any ***causal link*** between Quazite's practices and the Union's loss of support, the Board's decision that the employer's unfair labor practices caused the Union's loss of support cannot be sustained." [Emphasis added.] The Court further held and instructed the Board: "In substantiating its conclusion, the Board must either apply its own four-part test of *Master Slack*, or alternatively give a reasoned explanation for changing that test or for departing from it in this case." [Emphasis added.]

The *Quazite* case clearly supports the argument that the General Counsel and/or the Charging Party has the burden of proof with respect to presenting facts that are sufficient to compel the Board to order dismissal of a petition. That burden can only be met by presenting ***substantial and specific evidence*** that the employer's misconduct tainted the decertification petition to the extent that it should be dismissed.

The NLRB in *Indiana Cabinet Company, Inc.* (1985) 275 NLRB 1209 required specific proof that a supervisor's misconduct was sufficient to taint the entire petition, which it found was lacking in this case: "However, even when the purported 8(a)(1) violation based on Brelage's statement is considered, ***it is not so far reaching in effect as to***

taint the entire petition. As the judge acknowledged in footnote 8 of his decision, ***evidence of taint is lacking*** because there is ***no showing*** that any employees other than Brown and Collier were aware of Brelage's conversation with Brown and Collier concerning the possibility of starting a petition. Accordingly, if this conversation constituted a violation, it served not to invalidate the entire petition, ***but only to taint the petition signatures of Brown and Collier***." [Emphasis added.]

Also, in withdrawal of recognition cases, the Board looks to the seriousness of the conduct. If the level of conduct is minor, there is no violation. In *Hydro Conduit Corporation* (1981) 254 NLRB 433, an employee discussed a decertification petition among congregating employees in the lunchroom. It was unclear whether this employee was a supervisor. However, the Board held that it was irrelevant as to whether the employee was a supervisor because his conduct did not rise to the level of a ULP: "Moreover, assuming arguendo that Eggleston was a supervisor, we would still dismiss the complaint. The record shows that Eggleston was a member of the bargaining unit and a member of the Union and, in circulating the petition, was acting in concert with his fellow employees, and not as a representative of management. Nor did management encourage, authorize, or ratify Eggleston's actions or lead the employees to believe he was acting for management. ... [¶] ... The General Counsel's case rested solely on the theory that the petition was tainted because of the action of Eggleston, the alleged supervisor. The facts do not support this theory. ... [¶] [¶] [¶] After reviewing all of the evidence before us, we see nothing to show that management had anything to do with the preparation of the petition; that Eggleston spoke for management; or that the employees considered that Eggleston was acting on behalf of management. ***We therefore would find no violation of the Act even if Eggleston were a supervisor."*** [*Id.* at 433-434; emphasis added.]

Like withdrawals of recognition, RM petitions also require a good faith reasoned belief that the union no longer enjoys majority support. Because of the good-faith requirement, an employer is not permitted to rely on an insufficient showing of interest or a tainted decertification petition. [*Levitz Furniture Company of the Pacific, Inc.*(2001) 2001 WL 327063 (NLRB).] Therefore, RM cases are also relevant to a determination as to whether a decertification petition should be dismissed.

The cases cited above demonstrate that the NLRB undertakes an analysis of the seriousness of the conduct and its tendency to have affected the employee's sentiments and desires concerning union representation. They clearly establish that mere assistance by an employer or its supervisors is insufficient to ignore the true and unhampered expression of employees' choice and that there must be a causal connection between the employer's misconduct and the resulting disaffection from the union. Moreover, the cases also contemplate discounting allegedly "tainted" signatures from the showing of interest to establish whether the decertification is still sufficient and therefore reflects the true desires of the employees. The cases also demonstrate that the burden of proof rests with the party requesting that the decertification petition be

dismissed and that this burden is only met by presenting specific and substantial evidence that the employer's misconduct in fact caused the employees' disaffection with the union. Logic dictates that the misconduct, then, existed prior to the existence of the petition and not concurrently with an employee-driven decertification effort.

It must be noted that in all of the withdrawal of recognition and RM cases, there was always more than a minimal level of assistance.

And once again, in any case where there has been an election, an outcome-determinative analysis should be employed.

V.

CLOSING REMARKS

In evaluating what is an appropriate remedy in any case, the Board should be guided by the directives espoused in *Laflin & Laflin v. ALRB* (1985) 166 Cal.App.3d 368. In *Laflin & Laflin*, the employer failed to provide a complete employee list. The Board's order issued in response to the single ULP required the employer to cease and desist from in any manner interfering with, restraining, or coercing any employee in the exercise of organization rights guaranteed by the Act, to read a notice to assembled employees on company time, which included all employees whether they were in the bargaining unit or not and which placed no time limits on question and answer periods, and to expand access to union organizers relative to all employees, whether temporary or permanent, and whether in the bargaining unit or not. The Court of Appeal for the Fourth District, Division 2, held that the order, considered cumulatively, was not remedial, but rather punitive in nature and held: "When the order of the Board is so severe in comparison to the conduct involved and its effect on the free exercise of employee rights that it is clearly punitive in character, the order will be annulled. [Citations.]" [*Id.* at 380.]

The *Laflin & Laflin* case holds that in fashioning a remedy, the ***severity*** of the conduct should be considered. That should certainly hold true where the Board is charged with considering whether to impose an extremely harsh remedy such as dismissal of a petition and/or set aside of an election.

Dismissing a decertification petition which truly reflects the desires of the employees who signed it (once any "taint" is removed) or setting aside the results of a valid election are extremely harsh remedies. Both remedies have the effect of silencing the voices of those who signed the petition or cast ballots and both remedies do more to hinder the untrammeled and free expression of employee choice concerning representation than does minor assistance by an employer in circulating a decertification petition. Because of that fact, the Board should be extremely vigilant in ordering either remedy.

Where a decertification petition is at issue, the Board should simply discount the extent of the taint to the petition to determine whether there is still an adequate showing of interest. The Board can use the factors set forth in *Overnite Transportation Company, supra,* and *Master Slack, supra,* but in all cases more than minor or minimal assistance should be proven and a causal connection between the improper conduct and the resulting decertification petition should be established.

Once the employees have cast their ballots in an election, only that conduct which could have reasonably tended to affect the results of the election should be considered. If any improper conduct which affected the decertification petition which preceded the election is to be considered, such conduct should only be considered to the extent necessary to determine whether there was taint to the petition and what the extent of that taint was. The Board should then subtract the tainted signatures to determine whether the showing of interest was nevertheless adequate. If the showing of interest still remains sufficient, then only post-petition conduct that is outcome-determinative should be considered.

Sincerely,

Charley M. Stoll

CMS/vlw